

**General Fabrications Corp. and Sheet Metal Workers  
International Association, Local Union #33, of  
Northern Ohio, AFL-CIO. Case 8-CA-31000**

December 30, 1999

**DECISION AND ORDER**

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN  
AND HURTGEN

Pursuant to a charge filed on August 30, 1999, the General Counsel of the National Labor Relations Board issued a complaint on October 5, 1999, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 8-RC-15667. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).)<sup>1</sup> The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On November 19, 1999, the General Counsel filed a Motion for Summary Judgment. On November 22, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>1</sup> The Union filed a representation petition on December 4, 1997, in Case 8-RC-15667. Thereafter, an election was held on January 20, 1998, in which there were 13 votes cast for, and 14 votes against, the Union, with 4 determinative challenged ballots. The Union filed timely objections to the election, some of which were coextensive with unfair labor practice allegations contained in a consolidated complaint that issued on May 6, 1998 in Cases 8-CA-29443, et al. On May 13, 1998, the Regional Director issued an order that directed a hearing on objections and challenged ballots in Case 8-RC-15667 and consolidated that case for hearing with the aforementioned unfair labor practice cases. On September 17, 1998, Administrative Law Judge George Carson II issued his decision, which overruled the challenges to all four ballots and found that the Respondent had engaged in objectionable conduct affecting the election. The judge also found numerous unfair labor practices, and concluded that these warranted a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). On August 5, 1999, the Board issued a decision affirming the judge's decision, including the overruling of the challenges to the four ballots and the finding of objectionable conduct. *General Fabrications Corp.*, 328 NLRB 1114 (1999). Member Hurtgen, however, dissented from the granting of the *Gissel* bargaining order. *Id.* at 1117. The Board severed Case 8-RC-15667 from the unfair labor practice cases, and remanded it to the Regional Director. The Board ordered the Regional Director to open and count the challenged ballots, and to issue a certification of representative if the revised tally showed that the Union had received a majority of the valid votes cast, including those of the four challenged voters. On August 13, 1999, the Regional Director issued a revised tally of ballots that showed that 16 votes were cast for the Union and 15 against. Accordingly, the Regional Director issued a certification of representative on August 13, 1999.

**Ruling on Motion for Summary Judgment**

In its answer the Respondent admits its refusal to bargain, but denies the validity of the certification apparently on the basis of the Board's disposition of certain challenged ballots.<sup>2</sup>

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent, an Ohio corporation, with an office and place of business at 7777 Milan Road, Sandusky, Ohio, has been engaged in the designing, building, and installing of cleaning equipment and painting equipment. Annually, in conducting its business operations described above, the Respondent purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of Ohio. We find that the Respondent is an employer engaged in com-

<sup>2</sup> The Respondent's answer also denies that the certified unit is appropriate. The Respondent, however, stipulated to the appropriateness of the unit in the representation case. *General Fabrications Corp.*, 328 NLRB at 1132. Further, any question regarding the appropriateness of the unit could and should have been raised in the representation proceeding. *Playhouse Square Foundation*, 291 NLRB 995 fn. 1 (1988). We therefore find that the Respondent's denial in this regard does not raise any issue warranting a hearing in this proceeding.

In addition, the Respondent denies that a representation election was held on January 20, 1998, and that the Region issued a certification of representative on August 13, 1999. Neither of these denials warrants a hearing as uncontroverted record evidence attached to the General Counsel's motion establishes the General Counsel's allegations as to these matters.

Finally, no issue warranting a hearing is raised by the Respondent's denial of the complaint allegation that the Union has been the exclusive collective-bargaining representative of the unit employees since December 4, 1997. In ordering the Respondent to bargain with the Union under *Gissel Packing*, supra, the Board found in the unfair labor practice case portion of *General Fabrications*, supra, at slip op. 20, that the Union has been the exclusive bargaining representative of the unit since December 4, 1997.

In the prior case, Member Hurtgen declined to pass on the *Gissel* issue because there was at least a reasonable possibility that the Union would become the certified representative. That reasonable possibility has now become a reality. Thus, Member Hurtgen concurs in the certification, the violation as of August 16, 1999, and the bargaining order. However, he concludes that a *Gissel* order is unwarranted. His view, as stated in the prior decision, is that: "the [Supreme] Court did not contemplate a *Gissel* order where the Union wins the election and is certified."

merce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. *The Certification*

Following the election held January 20, 1998, the Union was certified on August 13, 1999, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time welders, fabricators, electricians, and installers employed by the Employer at the Sandusky, Ohio facility, but excluding all office clerical employees, sales persons, engineers and professional employees, guards and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

### B. *Refusal to Bargain*

Since August 16, 1999, the Union has requested the Respondent to bargain, and, since that date, the Respondent has refused. We find that the Respondent's refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.<sup>3</sup>

## CONCLUSION OF LAW

By refusing on and after August 16, 1999, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*,

<sup>3</sup> The Board found in the unfair labor practice case portion of *General Fabrications*, *supra*, that the Respondent unlawfully refused to recognize and bargain with the Union since December 4, 1997. Our finding here does not affect that finding. Rather, we find, as alleged in the complaint in this case, that on August 16, 1999, after being certified as the collective-bargaining representative, the Union made an additional demand for bargaining and that the Respondent's refusal to bargain since that date constitutes an unlawful refusal to bargain in violation of Sec. 8(a)(5) and (1) of the Act.

149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

## ORDER

The National Labor Relations Board orders that the Respondent, General Fabrications Corp., Sandusky, Ohio, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a) Refusing to bargain with Sheet Metal Workers International Association, Local Union #33, of Northern Ohio, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time welders, fabricators, electricians, and installers employed by the Employer at the Sandusky, Ohio facility, but excluding all office clerical employees, sales persons, engineers and professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Sandusky, Ohio, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 16, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Sheet Metal Workers International Association, Local Union #33, of Northern Ohio, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time welders, fabricators, electricians, and installers employed by us at the Sandusky, Ohio facility, but excluding all office clerical employees, sales persons, engineers and professional employees, guards and supervisors as defined in the Act, and all other employees.

GENERAL FABRICATIONS CORP.